

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
and Jon Wellinghoff.

Midwest Independent Transmission System
Operator, Inc.

Docket Nos. ER06-690-002
ER06-690-003

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued September 8, 2006)

1. On May 15, 2006, the Commission issued an order conditionally accepting proposed revisions filed by the Midwest Independent Transmission System Operator, Inc. (Midwest ISO) to its Open Access Transmission and Energy Markets Tariff (TEMT) and to the Agreement of Transmission Facilities Owners to Organize the Midwest Independent Transmission System Operator, Inc., a Delaware Non-Stock Corporation (TO Agreement).¹ The proposed revisions sought to consolidate and clarify the dispute resolution procedures contained in those documents. The Midwest ISO Transmission Owners² filed a timely request for rehearing or clarification of the May 15 Order. As

¹ *Midwest Independent Transmission System Operator, Inc.*, 115 FERC ¶ 61,177 (2006) (May 15 Order).

² The Midwest ISO Transmission Owners, for purposes of this proceeding, consist of: Ameren Services Company, as agent for Union Electric Company d/b/a AmerenUE, Central Illinois Public Service Company d/b/a AmerenCIPS, Central Illinois Light Company d/b/a AmerenCILCO, and Illinois Power Company d/b/a AmerenIP; Alliant Energy Corporate Services, Inc., on behalf of Interstate Power and Light Company (f/k/a IES Utilities Inc. and Interstate Power Company); American Transmission Systems, Incorporated, a subsidiary of FirstEnergy Corp.; Aquila, Inc. d/b/a Aquila Networks (f/k/a Utilicorp United, Inc.); City of Columbia Water and Light Department (Columbia, MO); City Water, Light & Power (Springfield, IL); Duke Energy Shared Services, Inc. f/k/a Cinergy Services, Inc. for The Cincinnati Gas & Electric Co. d/b/a Duke Energy

(continued)

discussed below, we will deny the Midwest ISO Transmission Owners' request for rehearing.

2. In addition, on June 14, 2006, the Midwest ISO filed revised tariff sheets to comply with the May 15 Order. As discussed below, we will conditionally accept the revised tariff sheets, to become effective May 1, 2006, subject to a further compliance filing.

Background

3. On March 1, 2006, as amended on March 16, 2006, the Midwest ISO filed proposed revisions to its TEMT and the TO Agreement to consolidate and clarify the dispute resolution procedures contained in those documents. The dispute resolution procedures were located in section 12 of the TEMT and appendix D of the TO Agreement. The Midwest ISO proposed to consolidate its dispute resolution procedures in a new attachment HH (Dispute Resolution Procedures) of the TEMT, and to revise section 12 of the TEMT and appendix D of the TO Agreement to incorporate the attachment HH procedures by reference. In addition, the Midwest ISO proposed to modify and/or clarify its dispute resolution procedures in a number of respects. In the May 15 Order, the Commission conditionally accepted the proposed revisions, to become effective May 1, 2006. The May 15 Order directed the Midwest ISO to make a number of specific changes to its proposal in a compliance filing.

4. On June 14, 2006, in Docket No. ER06-690-002, the Midwest ISO Transmission Owners filed a timely request for rehearing of the May 15 Order. On that date, in Docket No. ER06-690-003, the Midwest ISO submitted its filing in compliance with the May 15 Order (June 14 Compliance Filing).

Ohio, Inc., PSI Energy, Inc. d/b/a Duke Energy Indiana, Inc., and The Union Light, Heat and Power Company d/b/a Duke Energy Kentucky, Inc.; E.ON U.S. LLC (for Louisville Gas and Electric Company and Kentucky Utilities Company); Great River Energy; Hoosier Energy Rural Electric Cooperative, Inc.; Indianapolis Power & Light Company; Minnesota Power, and its subsidiary Superior Water, Light & Power; Montana-Dakota Utilities Co.; Northern Indiana Public Service Company; Northern States Power Company and Northern States Power Company (Wisconsin), subsidiaries of Xcel Energy Inc.; Northwestern Wisconsin Electric Company; Otter Tail Power Company; Southern Illinois Power Cooperative; Southern Indiana Gas & Electric Company (d/b/a Vectren Energy Delivery of Indiana); and Wabash Valley Power Association, Inc.

5. Notice of the Midwest ISO's June 14 Compliance Filing was published in the *Federal Register*, 71 Fed. Reg. 37,064 (2006), with protests and interventions due on or before July 5, 2006. None was filed.

Discussion

A. Request for Rehearing

1. The May 15 Order

6. In the May 15 Order, the Commission directed the Midwest ISO to clarify proposed attachment HH to better protect the rights of intervenors to an arbitration proceeding. Among those clarifications was the requirement that a decision of the arbitrator may be appealed to the Commission on the grounds that intervenors' procedural rights have not been adequately represented and/or have been prejudiced. The Commission established that "[s]uch review occurs at the conclusion of the arbitration process, when parties may appeal the arbitrator's decision and findings of fact."³

2. The Midwest ISO Transmission Owners' Request for Rehearing

7. The Midwest ISO Transmission Owners seek rehearing of the Commission's finding that intervenors (or any party to an arbitration) must await the issuance of a final arbitration decision before they may appeal procedural rulings of the arbitrator to the Commission. The Midwest ISO Transmission Owners maintain that "[s]ince Attachment HH provides the arbitrator with broad discretion over the extent of participation by intervenors, it is critical that a party have the right to appeal a decision of the arbitrator limiting rights of participation at the time that decision is made."⁴ For instance, the Midwest ISO Transmission Owners argue that a right of "interlocutory appeal" would ensure that any aggrieved party has the ability to fully participate in arbitration proceedings "thereby limiting the likelihood of later substantive appeals and re-litigation."⁵ The Midwest ISO Transmission Owners maintain that permitting the interlocutory appeal of the arbitrator's decisions on the procedural rights of intervenors will also reduce the likelihood that the Commission or an arbitrator will have to rehear

³ May 15 Order, 115 FERC ¶ 61,177, at P 31.

⁴ Midwest ISO Transmission Owners Rehearing Request at 4 (internal citation omitted).

⁵ *Id.* at 5.

entire portions of the case – an outcome which could waste money and resources. Moreover, the Midwest ISO Transmission Owners assert that an interlocutory appeal “should act as a deterrent to arbitrary procedural decisions by the arbitrator.”⁶

3. Commission Determination

8. In the May 15 Order, the Commission found that entities must be afforded the opportunity for Commission review of an arbitrator’s decision if they believe their rights have not been adequately represented and/or have been prejudiced.⁷ The Commission established, however, that “such review occurs at the conclusion of the arbitration process, when parties may appeal the arbitrator’s decision and findings of fact.”⁸ An interlocutory appeal of an arbitrator’s procedural decisions could cause unnecessary disruptions to the arbitration process, compromising the arbitration process and resulting in delayed conclusions. We believe that requiring entities to wait until the conclusion of the arbitration process to appeal an adverse procedural decision strikes a balance between preserving the benefits of the arbitration process while safeguarding the due process rights of participants. We believe that this compromise will not result in unnecessary duplicative arbitration proceedings and litigation before the Commission. Moreover, we disagree with the Midwest ISO Transmission Owners’ conclusion that an interlocutory appeal is necessary to deter arbitrary procedural decisions by the arbitrator. We find that the ability for entities to appeal an adverse procedural decision at the conclusion of an arbitration serves as sufficient deterrent to arbitrary procedural decisions by the arbitrator. Accordingly, we will deny the Midwest ISO Transmission Owners’ request for rehearing.

B. Compliance Filing

9. In its June 14 Compliance Filing, the Midwest ISO filed revisions to proposed attachment HH of its TEMT pursuant to the directives of the May 15 Order. Except as discussed below, we find that the June 14 Compliance Filing satisfies the requirements of the May 15 Order.

⁶ *Id.*

⁷ May 15 Order, 115 FERC ¶ 61,177, at P 31.

⁸ *Id.*

1. **Bringing a Dispute to the Jurisdictional Authority**

a. **May 15 Order**

10. In the May 15 Order, the Commission noted that proposed section II.B.4 of attachment HH provided that any parties who dispute the proposed resolution reached under the informal dispute resolution procedures of proposed section II shall have the opportunity to initiate a dispute in accordance with the attachment HH dispute resolution procedures or the Federal Power Act (FPA). The Commission found, however, that the Midwest ISO must “clarify proposed section II.B.4 to provide that such parties should participate in informal dispute resolution under section II, and mediation under section III, if necessary and the [Alternate Dispute Resolution (ADR)] Committee deems it appropriate, before bringing such disputes to the Commission for resolution.”⁹

11. The Commission also found that there may be an inconsistency in proposed section III.A, which establishes when mediation is required. The Commission found that section III.A, as proposed, “leaves unclear whether, and if so when, a party to a dispute that is not resolved through informal dispute resolution procedures in section II *may* terminate the process before or during mediation and file a complaint with the Commission, and the consequences for such action.” The Commission directed the Midwest ISO to clarify proposed section III.A in this regard.¹⁰

b. **June 14 Compliance Filing**

12. The Midwest ISO proposes revisions to section II.B.4 of attachment HH to provide that:

Any Parties who dispute the proposed change shall then have the opportunity to participate in informal dispute resolution under this Section II and mediation under Section III, if necessary and the Committee deems it appropriate, before initiating such a dispute in accordance with these Dispute Resolution Procedures or the Commission pursuant to the FPA for resolution.

⁹ *Id.* P 21.

¹⁰ *Id.* P 15.

13. The Midwest ISO also revised section III.A to clarify that a party may file a complaint with the Commission “at any time prior to the conclusion of a mediation.”

c. Commission Determination

14. We find that the above proposed revisions are generally consistent with the May 15 Order. However, to provide further clarity that parties should participate in informal dispute resolution and mediation before bringing disputes to the Commission for resolution, we will require that section II.B.4 of attachment HH be revised as follows:

Any Parties who dispute the proposed change ~~shall then have the opportunity to~~ should participate in informal dispute resolution under this Section II and mediation under Section III, if necessary and the Committee deems it appropriate, before bringing ~~initiating such a dispute to in accordance with these Dispute Resolution Procedures or the Commission~~ under relevant provisions of the FPA for resolution.

2. Role of Mediators

a. May 15 Order

15. The May 15 Order directed certain changes as to the role of mediators in the proposed ADR procedures. Specifically, the proposed revisions required, in certain situations, for the mediator to provide a recommendation and an assessment of the merits of the parties’ positions. The Commission expressed concern that a requirement that the mediator provide an assessment of the merits of the parties’ positions could compromise the neutrality of the mediator and thereby compromise the effectiveness of the mediation process. The May 15 Order also stated that this could limit the pool of individuals that could serve as mediators. The Commission found that if the parties desire a non-binding advisory opinion during the course of the mediation process, they should be provided the option to have an individual, other than the mediator, provide an early neutral evaluation of the parties’ positions and to have assistance from the mediator and the ADR Committee in identifying and securing the services of such an individual. The Commission directed the Midwest ISO to revise section III.B.4 accordingly.¹¹

¹¹ *Id.* P 48-49.

b. June 14 Compliance Filing

16. The Midwest ISO revises section III.B.4.iv of attachment HH to add that:

In the event Parties desire a non-binding advisory opinion during the course of the mediation process, they may request an individual, other than the mediator, to provide an early neutral evaluation of the Parties' positions. Parties may seek assistance from the mediator and the Committee in identifying and securing the services of such an individual.

c. Commission Determination

17. We find that the Midwest ISO has complied with the directive in the May 15 Order to revise this section III.B.4. However, we find that part of section III.B.5 is contradictory of the revised section III.B.4. Specifically, section III.B.5 states that the mediator can provide, at the request of the parties, a written, confidential, non-binding recommendation to the parties. Therefore, we will require the Midwest ISO to revise section III.B.5 to be consistent with section III.B.4, to clarify that section III.B.5 does not permit a mediator to provide an early neutral evaluation of the merits of the parties' positions. Furthermore, we will require the Midwest ISO to verify that the revised provisions of attachment HH are consistent with, and not contradictory to, all other provisions of attachment HH, and make any required revisions accordingly.

The Commission orders:

(A) The Midwest ISO Transmission Owners' request for rehearing is hereby denied, as discussed in the body of this order.

(B) The Midwest ISO's June 14 Compliance Filing is hereby conditionally accepted, as discussed in the body of this order.

(C) The Midwest ISO is hereby directed to make a compliance filing consistent with this order within 30 days of the date of this order, as discussed in the body of this order.

By the Commission. Commissioner Moeller not participating.

(S E A L)

Magalie R. Salas,
Secretary.